No. 62

Supreme Court of the United States

OCTOBER TERM, 1964

FEDERAL TRADE COMMISSION, *Petitioner*,

v.

COLGATE-PALMOLIVE COMPANY and
TED BATES & COMPANY, INC., *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT TED BATES & COMPANY, INC.

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QUESTION PRESENTED

Whether a television advertisement communicating a completely truthful claim as to the quality or merits of a product is illegal under Section 5 of the Federal Trade Commission Act solely because of the undisclosed use of a mock-up or prop.

STATUTES INVOLVED

In addition to Section 5(a)(1) and 5(a)(6), set forth in the Government Brief (p. 2), this proceeding raises issues under Section 5(i) of the Federal Trade Commission Act, 52 Stat. 114, as amended, 15 U. S. C. § 45(i). That provision is set out in full text in an appendix to this Brief (p. 42, *infra*).

STATEMENT

> "We are considering no basic deception, but only the situation where, in illustrating faithfully a test which has been actually performed, an advertiser uses some foreign mock-up or makeup." (Aldrich, C. J., R. 136).

The question of law here presented is whether an advertisement that makes no false or misleading statement relating to the advertised product or what it can do can be held as a matter of law to be a false and misleading advertisement and therefore a deceptive or unfair practice under Section 5(a)(1) of the Federal Trade Commission Act.

As precisely focused in the Commission order set aside by the court below, the legal issue has been even more sharply delineated: Where an advertisement makes a completely truthful claim about what a product can do, and that claim is communicated by a faithful portrayal of a test or experiment, which test has in fact been performed and can be reproduced, is there any *factual* misrepresentation that violates Section 5 merely because in photographing that valid test or experiment there was an undisclosed use of a photographic prop or mock-up?

This is what Part I of the Commission's final order (R. 93-94), directed against the respondent Colgate-Palmolive Co., an advertiser, and Part III of its order (R. 94), directed against Ted Bates & Co., an advertising agency, prohibit. Those parts of the order rest upon a legal conclusion, reiterated by the Commission and rejected by the court below, that an advertisement that makes completely truthful claims concerning the advertised product or about what it can do is nevertheless *per se* deceptive whenever an undisclosed photographic prop is used in accurately portraying a test or experiment illustrating what the product in fact does.

Even more simply stated, the question is: If the viewer or reader of the advertisement buys the product, and it will

do exactly what the portrayal in the advertisement asserts it will do, can there be any unlawful misrepresentation?

The Government in its brief here, however, seeks to distort and obscure the issue by references to "sham tests" and "rigged experiments" and by posing the issue in terms of an advertisement that makes patently false claims.[1]

The question now posed was not tried in the hearing that was held on the Commission's complaint against the respondents.

The Issue Not Before This Court—Misrepresentation Of Moisturizing Properties Of The Advertised Product

In that proceeding, the Commission had charged that the challenged advertisements falsely made the claim that the advertised shaving cream had such moisturizing properties that it could be used even to shave coarse sandpaper rapidly and without prolonged soaking. This charge, denominated by the court below as the "single misrepresentation" (R. 42), indeed "trivial" (R. 38), was dismissed by the Commission's Hearing Examiner.

The Commission reversed the Examiner and held that the claim that the product could shave sandpaper rapidly and without soaking was false. It issued an order enjoining both respondents from

> "misrepresenting, in any manner, directly or by implication, the quality or merits of [Rapid Shave or any other shaving cream]." (R. 8).

On the first appeal, the court below held that the Commission was justified in addressing an order to the particular misrepresentation it had found the respondents to have made. It held further, however, that since "respondents' only offense was the making of a single misrepre-

[1] For example, the "Question Presented" in the Government's brief on the merits differs significantly from the "Question Presented" in the petition for certiorari. In the latter it was made clear that the order the Government seeks to sustain applies to an advertisement making "a product claim (which may itself be true)." The critical parenthetical phrase is omitted in the brief. (Compare Gov't Br. p. 2 with Pet. p. 2).

sentation about a single product" (R. 42), the scope of this part of the order was too broad. On remand the Commission entered a slightly revised order on this part of the case. (R. 94, 95).[2]

On their second appeal, respondents urged that, even with respect to this part of the revised order, the mandate had not been followed. The Court of Appeals again returned this part of the order to the Commission for further revision, for the reason that "the Commission has been preoccupied with its broad opposition to mock-ups and has never expressed its views with respect to the proper scope of an order directed to more narrowly conceived substantive misconduct." (R. 139).

These paragraphs of the order relating to the "single misrepresentation" charged in the original complaint are not here in issue. (Gov't Br. p. 6, n. 1). It is not accurate to state, as the Government does, that the reason they are not in issue is that they were "sustained by the court below." The reason they are not in issue is that in seeking review by this Court and reversal of the judgment of the Court of Appeals on another issue, the Government has not presented any question relating to them. The paragraphs of its order dealing with the "single misrepresentation" remain for reconsideration by the Commission on remand.[3]

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[2] The final order on remand was separated into four parts. Parts I and II applied to the advertiser, Colgate; and Parts III and IV applied to the advertising agency, Bates. Parts II and IV relate to the misrepresentation as to the moisturizing properties of the shaving cream. (R. 93-95).

[3] The Government asks that, if the judgment below is reversed, the case be remanded to the Court of Appeals "for entry of judgment affirming and enforcing the Commission's order." (Gov't Br. p. 25). This prayer is for broader relief than the Government would be entitled to in any circumstances and is grounded in the Government's misunderstanding of what was decided by the Court of Appeals. Even if this Court should be persuaded that the Commission's legal views on mock-ups had merit, the fact would remain that the Commission had been "preoccupied with its broad opposition to mock-ups" and had not focused on the proper scope of an order aimed at the "single misrepresentation" found to have

It was the "single misrepresentation" issue, relating to a claim concerning the qualities and merits of a particular shaving cream, that was tried before the Commission's Hearing Examiner. The Commission was affirmed by the Court of Appeals in its reversal of the Hearing Examiner's decision that this constituted nothing more than puffing, and only the scope of its order remains in question, and that issue is not in this Court.

The Issue Before The Court—The Use of Photographic Props Or Mock-ups In An Advertisement Making Completely Truthful Claims

What is before this Court is a completely different question—newly imported into this proceeding by the Commission itself after the evidentiary hearing was over—and in no way concerning any claim relating to the advertised product or what it can do.

That legal question arose out of the manner in which the claim relating to the advertised product was communicated in the advertisement. The assertion that with the aid of the advertised shaving cream sandpaper could be shaved was communicated in the video or picture part of the television commercial by a portrayal of sandpaper being shaved. Instead of sandpaper, however, a piece of plastic coated with sand was used in photographing the portrayal. This was done because, as the Hearing Examiner found and as has been accepted throughout this proceeding,

> "When placed under a television camera, sandpaper appears to be nothing more than plain, colored paper; the texture or grain of the sandpaper is not shown. Thus it is necessary to improvise—use a mock-up—if what is seen by the television audience is to have the appearance of sandpaper." (R. 12).

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been made by respondents. Since the Government has not in this Court questioned the part of the decision of the court below directing the Commission to reconsider that part of its order, the case must be remanded to the Commission for such reconsideration regardless of how this Court disposes of the question presented to it.

In short, had the claim that application of the shaving cream permitted sandpaper to be shaved promptly and without soaking been true, *i.e.*, were the portrayed demonstration accurate in showing what the product could do, it still would have been necessary in faithfully photographing that test or experiment to use the sand-coated plastic mock-up or photographic prop.

In its first opinion, however, the Commission went wholly beyond the question whether the claim for the product that it could shave sandpaper was true or false. It took the position (and devoted the bulk of its opinion to attempting to sustain it) that *even if* a product can do everything that an advertisement represents it can do—even if the faithfully portrayed experiment or test is completely valid—there is still a violation of Section 5 where for any reason there is an undisclosed use of a photographic prop or mock-up. As the Commission posed this purely hypothetical issue, concerning which there was no evidence of record whatever:

> "(2) Assuming that there was no misrepresentation as to the effectiveness of 'Rapid Shave' in shaving sandpaper, was there nonetheless a misrepresentation in the visual demonstration offered as proof of such effectiveness?" (R. 14).[4]

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[4] There can be no contention that the Commission did not recognize at the outset that it was dealing with a novel *question of law*. It elsewhere posed the question on the assumption "that the commercials did fairly and truthfully describe 'Rapid Shave's' effectiveness in shaving sandpaper," and whether, "if that were so, the commercials would be deceptive, within the meaning of the statute . . ." because of the use of a photographic prop alone. (R. 18).

That no evidence was introduced on the use of a photographic prop or mock-up in an advertisement, making a completely truthful claim, has not been and cannot be challenged by the Government. There was no evidence on any of the assumptions advanced here and in the court below in support of the Commission's interpretation of the Act. During the course of oral arguments to the Hearing Examiner, counsel for the Commission stated: "The substitution of this plexiglass or this so-called mock-up for sandpaper might not be so important if you could shave this type of sandpaper in

In its first opinion, the Commission concluded as a matter of law that the undisclosed use of any mock-up or prop thus to portray a truthful claim about what an advertised product can do as a matter of law violated the Act. It entered a broad order, on the basis of that legal theory, against both respondents. On review, the issue was squarely presented whether the Commission's legal conclusion on the hypothetical issue was correct. As the court below put it, the basic issue was whether "mock-ups, or what the Commission chooses to call demonstrations that are not 'genuine', were illegal per se." (R. 42).

What cannot be escaped in this proceeding is that up to the time the Commission reversed its Hearing Examiner, the issue dealt with concerned a *false* claim communicated in part by portraying a photographic prop. After having disposed of the issue of the false claim concerning the product (an issue not before this Court), the Commission then turned to a hypothetical issue: whether the undisclosed use of a prop in a demonstration conveying a *completely truthful claim* about what the product could do would in and of itself be deceptive and render the advertisement false and misleading.[5]

In its decision and opinion on the first appeal, the court below concluded that, where an advertisement makes a

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the manner they show it on the television. But, the record establishes that you cannot shave sandpaper of this type in the manner shown on television. Therefore, there has been a misrepresentation of the moisturizing or soaking qualities of the shaving cream." (Record, Nos. 5972 and 5986, 1st Cir., p. 86).

[5] On the first appeal, the lower court remarked that, "On first reading we had thought that, in effect, it [the original order] simply forbade demonstrations which represented a product as doing something that it could not do, or as appearing to have qualities which it did not possess." But upon consideration the Court agreed that the order "would prohibit any demonstration *even if it did not misstate facts about, or misrepresent the appearance of, the product*, if it were not 'genuine' in that the actual substance used in the studio, because of technical problems of photography, was not the product itself." (R. 39-40). (Emphasis added).

completely truthful claim about what a product can do, the advertisement is not unlawful under the Act. If a portrayed demonstration, test or experiment (employing a photographic prop or mock-up) truthfully communicates what the product can do, there is no deception. "The viewer is not buying the particular substance he sees in the studio; he is buying the product. By hypothesis, when he receives the product it will be exactly as he understood it would be." (R. 42). The Commission's order was set aside, and the proceeding remanded.

The Commission did not seek review by certiorari on the controlling question of law that had been decided. It did not ask for reargument in the Court of Appeals. It accepted the remand from the Court of Appeals, and on remand it issued a further opinion (R. 47-60) reiterating its legal position on the stated premise that its earlier opinion had "failed to spell out sufficiently the theory of law on which the order was based." (R. 48). At the same time, it entered a second order, applicable to an advertisement making completely truthful product claims, which prohibited any "visual test or demonstration" that in its photographing employed

> "a mock-up or substitute material or article . . . instead of the genuine material or article represented to be used therein." (R. 45).

After considering objections filed by respondents (R. 61, 72), the Commission issued a *third* memorandum opinion (R. 96-98) and entered a *third* and final order (R. 93-95).

This final order was predicated upon the Commission's continued insistence that it could as a matter of law prohibit as violative of Section 5 of the Federal Trade Commission Act the undisclosed use of a photographic prop or mock-up in an advertisement portraying a test or experiment truthfully claiming what a product could in fact do, and that it could do so "regardless whether the product actually possesses such quality or merit." (R. 52). In its certiorari petition (Pet. p. 2) and in its brief here (Gov't Br. pp. 16, 18) the Government concedes, though somewhat

grudgingly in its brief,[6] that this final order (Parts I and III), entered after remand, applies even though the product claim is wholly true.

Respondents again petitioned for review, on the ground that the Commission had flouted the decision and mandate of the lower court. In its opinion, on this appeal, the court below concluded that its mandate on the first appeal had not been honored.[7]

The court undertook in addition to examine the Commission's restated legal basis for an order barring undisclosed use of photographic props in advertisements making truthful claims about what a product can do. On that controlling legal issue, the court below reiterated its original decision that the statute did not reach as a deceptive or unfair practice the portrayal of a test or experiment showing what the advertised product could in fact do merely because a photographic prop or mock-up was used in photographing

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[6] The Government in its brief persists in trying to color the mock-up issue that is before this Court with the false product claim issue that is not. Mostly it does this by the transparent means of using phrases such as "rigged tests" and "sham experiments" to describe portrayals with the aid of mock-ups or photographic props of tests that have been and can be made and that prove a quality claimed for a product. In addition, however, the Government seeks at one point to confuse matters by speaking of the danger of "not merely a false claim as to a product's capabilities, but the *further* false claim that these capabilities are being proven to the viewer by a test which the viewer is watching." (Gov't Br. p. 8). (Emphasis added). See *supra*, p. 3 n. 1, for discussion of the way an explicit concession that the Commission's order applies to advertisements making truthful claims, included in "Question Presented" in the Government's petition, is omitted from the "Question Presented" in its brief.

[7] The court below said, in its second opinion, "We reached a number of conclusions [in the court's first opinion] not labeled suggestions which the Commission was not free to disregard under the mandate." (R. 132). It instructed the Commission "as we thought we had directed it before" to enter an order confined to the facts of the case. (R. 139). No commentator on the present proceeding has reached a conclusion other than that the Commission did not comply with the mandate. See, *e.g.*, Note, The Rapid Shave Case, 38 Notre Dame Law. 350, 354 (1963); Millstein, The Federal Trade Commission and False Advertising, 64 Colum. L. Rev. 439, 486 (1964).

a completely truthful test or experiment that had been and could be performed. (R. 136-37). "If there is an accurate portrayal of the product's attributes or performance, there is no deceit" (R. 138) because

> "so far as deceit is concerned the buyer is interested in what he thinks he sees, and if what he buys can do and has done exactly what he thinks he sees it do, he has not been misled to any substantial degree." (R. 136).[8]

* * *

In the present case, a photographic prop was necessary because of inherent limitations of the television camera. (R. 12; *cf.* Gov't Br. p. 18). To point up the legal issue here presented and the impact of the order resting on it, there is illustrated on the opposite page an example offered to the Commission (R. 78) and in our brief in opposition (p. 21). Here the necessity for using a photographic mock-up in the truthful presentation of a test or experiment is equally evident even though it does not reside merely in the limitations of the television camera.

The claim that the advertised nylon rope will withstand 6,000 pounds of pull is true. The test or experiment proving this has been performed. The test can be performed again with the same result. But photographing the testing

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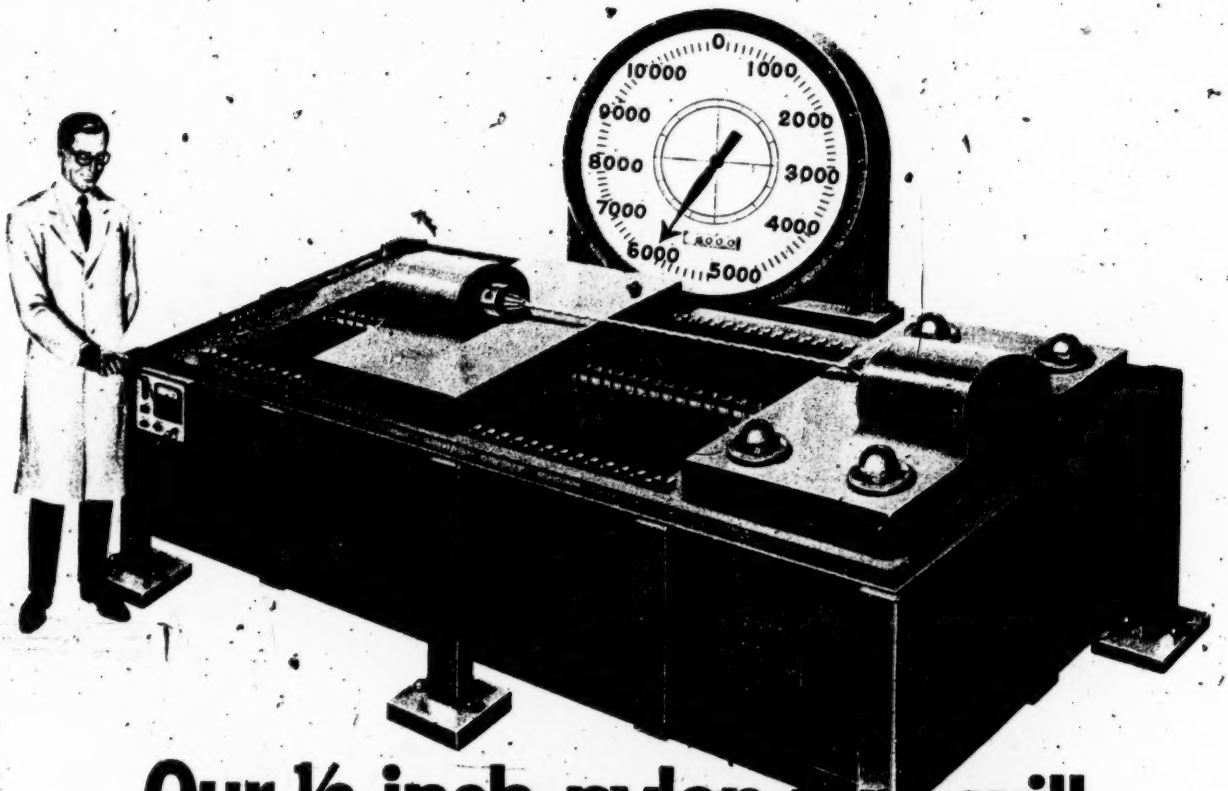
[8] The first opinion in this case in the meantime had been followed in Carter Products, Inc. *v.* FTC, 323 F. 2d 523 (5th Cir. 1963). In that case, where the order was reversed on September 27, 1963, the Commission on remand followed the court's mandate and rewrote its order on December 6, 1963, long before the certiorari petition in this case was filed on April 15, 1964.

Its rewritten order prohibited "pictures, depictions or demonstrations" to support comparative product claims only where the "portrayal or depiction is not an *accurate* comparison of such product with competing products." *Modified Order on Remand*, F.T.C. Docket 7943, Dec. 6, 1963.

Thus, although *Carter Products* was a mock-up and prop case, the final order does not prohibit the use of mock-ups to make truthful claims for the product advertised. Had the Commission, on remand in the present case, similarly limited its order to prohibit the undisclosed use of mock-ups or props in portrayals that made *inaccurate* claims about what the product could do, there would have been some timely consistency in its legal doctrine.



Our ½ inch nylon rope will withstand 6,000 pounds of pull

machine *in situ* is not feasible for many reasons. The particular machine is located in a crowded testing laboratory, surrounded by other machines, precluding an unobstructed photograph in the needed perspective. Transportation of this extremely heavy and bulky testing machine, weighing several tons, to the photographic studio is both impracticable and, even were it possible, would be extremely costly.

The mock-up of the testing machine is a completely faithful reproduction, in papier-maché, of the heavy steel machine itself. What the machine is portrayed doing is accurate, has been done and is reproducible. The rope shown being pulled and measured is a photographic prop made of cotton and not nylon because the nylon rope is so strong that in the reproduction of the test it would pull the machine mock-up apart. The strength claim made for the product is completely true; the product will do exactly what is claimed for it by the portrayal, and the depicted test proving the claim has been and can be performed precisely as seen by the viewer.

The legal question thus presented is whether the use of the photographic prop and mock-up is in any way deceptive to the purchaser, who, induced by this advertisement to purchase the rope, will get precisely what this advertisement asserts he will get.

SUMMARY OF ARGUMENT

I

A. The question presented by the Government in this Court involves the hypothetical case of an advertisement that makes a completely truthful claim for the advertised product and does so by a portrayal, in which a photographic prop or mock-up is used, of a test, experiment or demonstration that has been and can be performed and that shows the claimed quality of the product. In such a portrayal there is no deception of the viewer. There is no material misrepresentation. There is therefore no violation of Section 5 of the Federal Trade Commisison Act.

The hypothetical advertisement used as a predicate for the Commission's order makes two claims. One is that the product advertised has certain qualities and the second is that this primary claim has been and can be verified by a test or experiment. These are the only factual representations the advertisement makes relating to the product. They are the promise of the advertisement, and because both claims are true the promise is kept and there is no deception.

The Commission sees a further implied representation that what the viewer is seeing is the test or experiment itself and not a faithful photographic portrayal, which because of photographic necessity or for convenience uses a prop or mock-up. The position of the Government and the Commission concerning this supposed implied representation rests upon a fundamental confusion of what an advertisement says—the promise it makes about the advertised product—and the means used to convey the message. It is only in the message itself, however conveyed, that any representation relating to the product is made. To be sure, a viewer is entitled to infer that he has not been tricked by photography in the portrayal of the test or experiment that demonstrates a product's qualities. Where that occurs the portrayal makes a false claim as to what the product can do. But the viewer has not been tricked, and therefore what he may reasonably infer is true, in a case where, as here presented, there is an accurate portrayal of a test or experiment that has been and can be performed.

A misrepresentation in an advertisement is actionable under Section 5 of the Federal Trade Commission Act as unfair or deceptive only if it is a material misrepresentation. Even if one strains and assumes the existence of the implied representation that the Government (without record support of any kind) urges is seen in an advertisement portraying a test or experiment, the representation is plainly immaterial. A material representation is one that moves the reader or viewer to become a buyer. What induces the buyer to purchase is the claim that the product will per-

form as represented in the portrayed test. That is the material claim. His decision whether to purchase will not be affected by the technique used in portraying the test proving the claim.

B. There is, contrary to the Government's assertion, no judicial precedent for the novel position the Commission has taken—that an advertisement that conveys a message concerning a product that is completely truthful may nevertheless be deemed deceptive because of the means used to convey the message. There is no doubt that Section 5 of the Federal Trade Commission Act prohibits intentional misrepresentation of any fact that would constitute a material factor in a purchaser's decision whether to buy. The fact is, however, that the cases that have established this rule all involve misrepresentations concerning the product itself and not the method by which a representation is made. None of them confused the technique for conveying a message with what the message says.

Nor are hypothetical analogies suggested by the Government any more helpful to it than the decided cases. An advertiser would, as the Government says, almost certainly be prohibited under Section 5 from representing that he is a minister or a judge or a relative of the buyer, thus implying that he can be trusted in what he says. But this is an inapposite and utterly false analogy to the present case. An apter analogy would be to an advertiser who is a judge or minister but who, if a judge, is photographed wearing a red robe that appears black on television or, if a minister, a blue clerical collar that appears white when photographed.

C. The Commission's order cannot be sustained as an exercise of administrative discretion that is reviewable only for abuse of discretion. The argument that is made to support this position is completely circular. It assumes that a material misrepresentation has been made and that the Commission is exclusively entitled to weigh the harms caused by such a misrepresentation against the asserted

need for it in determining whether the misrepresentation should be proscribed. Administrative discretion can be invoked only if the Commission is right in its legal conclusion, as to which there is no doubt that the courts have the last word, that the advertisement hypothesized by the Commission does indeed make a material factual misrepresentation.

Second, if there were any room for the exercise of administrative discretion in this case, it could only be exercised on facts of record. There are no such facts here because the issue as now posed to this Court was not tried in the proceeding before the Commission's Hearing Examiner. What the Government says in its brief, therefore, and what the Commission has said in its opinions about the supposed harms of some advertisements that do not misrepresent the qualities of the advertised products is no more than surmise. Moreover, the arguments sought to be used to sustain a supposed exercise of Commission discretion are unfounded. They rest upon such transparent devices as the characterization of the kind of advertisements that are in issue as "rigged tests" and "sham experiments," and they hypothesize a viewer who is tricked when in fact, if the viewer becomes a purchaser, he will have purchased a product with exactly the qualities claimed for it in the advertisement he saw.

II

The Court of Appeals found in the Commission's order serious ambiguities. It saw these as inherent in any order based upon the proposition of law asserted by the Commission—that an advertisement making a completely truthful claim for a product may nevertheless be prohibited because of the undisclosed use of a prop or mock-up in a portrayal of a test or experiment that had been performed. The court could properly have set aside the Commission's order for its ambiguities without more, under this Court's decision in *FTC* v. *Henry Broch & Co.*, 368 U. S. 360, 367-68 (1962). The Government's arguments in support of the Commission's order on this score amount to concessions of

its ambiguity. Nevertheless, it was not mere problems of administration or compliance deriving from ambiguity that prompted the court below to set the Commission's order aside.

Rather, it found that the ambiguities in the Commission's order arose from the basic illogic of the distinction the Commission has purported to draw between the undisclosed use of props or mock-ups in portraying a test or experiment and their use in merely portraying a product, as in the use of mashed potatoes to represent ice cream under hot television lights. The court, indeed, said that "the nub of the case" was either that in a test or experiment situation the advertiser impliedly states that what the viewer sees is what is happening in a laboratory at that moment, and the ice cream manufacturer does not impliedly represent that what the viewer sees is ice cream, or that the representation is material in the first case but not in the second. The Commission, the court said, "says the ice cream case is different, but, with all deference, we find its opinion, while long on generalities, short on analysis." The kind of analysis that, if it were possible to do so, would justify the distinction the Commission has drawn is also lacking in the Government's brief in this Court. In a rational system of law a supposed legal principle cannot be a governing principle if it includes some situations and excludes others on a concept of inclusion and exclusion that cannot be articulated in terms of reason and logic.

III

When the Court of Appeals first heard this case, on the petitions of respondents to review the Commission's original order in the matter, it squarely rejected the proposition of law on which that order was based. It directed the Commission to write "an entirely new order" that would be "in accordance with" an opinion of the court that held that the undisclosed use of props or mock-ups to make truthful claims could not be prohibited under the Act.

The Commission did not ask for rehearing nor did it petition this Court for review of the Court of Appeals' judgment by certiorari. Instead, it accepted the Court of Appeals' remand. But it then merely revised its order slightly, and it did not retreat from or alter the underlying legal proposition that is the predicate for its order, which the Court of Appeals had rejected. The Commission so acted in the full knowledge that what it was doing would not be regarded as substantial compliance with the Court of Appeals' mandate and that the case would return to the Court of Appeals.

Although the Court of Appeals was quite clear that its mandate had been flouted, it indulged the Commission in its obduracy by examining the merits of its position. This Court is not bound by that act of grace, and it should hold that the Commission did not proceed in accordance with the mandate of the court below and its final order should be set aside for that reason alone. This Court is responsible for supervising the administration of justice by the federal courts. It is vital to the effective administration of justice that inferior tribunals, including administrative agencies, obey the decisions of the courts empowered to review their judgments. Indeed, Congress in Section 5(i) of the Federal Trade Commission Act has specifically provided that an order of the Commission on remand from a reviewing court must comply with the mandate of that court. That Congressional command should be enforced in this case.

ARGUMENT

I. AN ADVERTISEMENT MAKING A COMPLETELY TRUTHFUL CLAIM FOR A PRODUCT, BY ACCURATELY PORTRAYING A TEST OR EXPERIMENT THAT CAN BE AND HAS BEEN PERFORMED, IS NOT FALSE OR MISLEADING, OR UNFAIR OR DECEPTIVE, SOLELY BECAUSE A PHOTOGRAPHIC PROP OR MOCK-UP IS USED IN PHOTOGRAPHING IT.

The Government makes what purport to be two separate arguments in support of the parts of the Commission's order that are in issue. The first is that a material factual misrepresentation is somehow to be inferred from an advertisement showing accurately, with the aid of photographic props or mock-ups, a test or experiment that has been and can be performed and that communicates a truthful claim for a product, and that therefore such an advertisement is as a matter of law violative of Section 5 of the Federal Trade Commission Act. (Gov't Br. pp. 10-16). The second argument is that the question whether such an advertisement is condemned under Section 5 has been committed to the discretion of the Commission. (Gov't Br. pp. 16-21).

We shall show in this part of our argument that the Government is wrong in its first contention because the words of the statute—unfair or deceptive—cannot be made to comprehend an advertisement that makes with complete accuracy a truthful claim for the advertised product. We shall show further that the statute has never been construed to reach such an advertisement. We shall also show that the second, professedly independent, contention of the Government depends for its validity on the first in that, on the Government's own statement of the matter, the claimed discretion of the Commission is not invoked until and unless a material misrepresentation is discerned; furthermore, the Government's appeal for deference to the Commission's expert judgment rests on assertions of fact that are invalid and at best are mere surmises, which were not and could not have been found by the Commission because in the evidentiary record before it there was no evidence going to the legal issue hypothetically imported into the case.

A. WHERE A PHOTOGRAPHIC PROP IS USED IN PORTRAYING A TEST OR EXPERIMENT THAT HAS BEEN PERFORMED AND THE CLAIMS ABOUT WHAT THE PRODUCT CAN DO ARE TRUTHFUL, THERE IS NO DECEPTION UNDER THE ACT.

The Government argues that where a photographic prop or mock-up is used faithfully to portray a test or experiment—which has in fact been performed and which makes a claim about what the product can do that is completely truthful—there is nevertheless an unlawful deception or false representation. Stripped of its colorful adjectives, the contention is that this constitutes "the use of factual representations" that are false and that induce the viewer to purchase the product. (Gov't Br. pp. 10-11).

1. WHERE A FAITHFULLY PORTRAYED EXPERIMENT IS PRESENTED, THE UNDISCLOSED USE OF A PHOTOGRAPHIC PROP OR MOCK-UP BY ITSELF MAKES NO FACTUAL REPRESENTATION RELATING TO THE PRODUCT.

What are the factual representations about the product? The hypothetical advertisement on which the Commission erected its legal theory and that it prohibited by its order makes two claims: first, that the product has certain merits or qualities, *e.g.*, that shaving cream will shave sandpaper, or that nylon rope will sustain a specified pull; and, second, that this claim about what the product will do has been verified by an experiment or test.

Both of these claims about the product and what a test has proved that it will do are completely true. In neither of them is there any deception. These truthful claims are of course advanced to induce the purchase of the product. And when the purchaser buys the advertised product, it will do what the advertisement claims it will do.

These are the only factual representations that the advertisement makes about the product. The Commission in its opinions and the Government in its brief on the Commission's behalf contend that there is a further implied representation that the portrayal of the experiment or test not only shows a valid test, which has been performed with or on the product, but also unlawfully implies that no photographic props or mock-ups have been employed in faithfully portraying the test.

It is difficult to penetrate what the Government contends is this further implied "representation." What cannot be challenged is that whatever the Government is talking about has no direct or indirect relation to the product, who manufactures it, its qualities or merits, or the validity of the portrayed test demonstrating those merits. What the viewer sees and hears or reads is the *promise* of the advertisement and the factual representations it makes.[9]

The suggestion is advanced that the viewers are "led to believe that they [are] seeing visual proof of the respondents' claims in the form of a test." (Gov't Br. p. 11). They are seeing an accurate presentation of the such proof because the test portrayed has been performed, and it *does* prove the claim. As the court below observed:

> "The viewer is not buying the particular substance he sees in the studio; he is buying the product. By hypothesis, when he receives the product it will be exactly as he understood it would be." (R. 42).

The next formulation is that a photographic portrayal of an actual test, which has been performed and which proves the claim, is offered "to hold out something beyond the sponsor's say-so as proof of the truth of the sponsor's claims." (Gov't Br. p. 11). Of course, if the test has in fact been performed, it is proof of the claim. If the portrayal—what the viewer sees on the screen—is a faithful portrayal of the test, what the advertiser is offering as more than his "say-so" is truthful.[10]

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[9] An advertisement is a promise to the purchaser about the advertised product. If that promise is kept, there is neither deception nor falsity in the advertisement.

[10] Completely different verbal formulations in this effort to convert a truthful advertisement into a factual misrepresentation have run throughout this case. On the first appeal, the Commission position was that the misrepresentation lay in a depiction that was not "genuine and accurate." As to this, see R. 39-40, particularly n. 7.

In its second opinion, the Commission relied on "the popular belief that 'the camera doesn't lie' " (R. 49) and then rested on simply calling the use of a mock-up a material falsehood, or even

A formulation that the Government seems to favor, presumably because of its vividness, comes from the original opinion of the Commission:

> **"[T]he pictorial test of 'Rapid Shave,' proving to any doubting Thomas in the vast audience that 'By golly, it really *can* shave sandpaper!' was the clinching argument made by the commercials. The 'sandpaper test' was conducted, as the announcer said, '[t]o prove Rapid Shave's super-moisturizing power. . . .' Without this visible proof of its qualities, some viewers might not have been persuaded to buy the product." (R. 21; Gov't Br. pp. 11-12).**

To apply this formulation to the nylon rope advertisement illustrated *supra,* pp. 10-11, the advertisement does indeed say to the viewer, including any "doubting Thomas," that "By golly, that brand of nylon rope does hold 6,000 pounds!" (*Cf.* R. 21). That is a completely true representation and the experiment or test on the machine did demonstrate that it was true. By itself, the use of the mock-up makes no additional factual representation.

The Government position boils down to saying that inherent in every photographic portrayal of a test or experiment demonstrating a product claim is an implied factual representation not merely that everything the advertisement tells the viewer about the product is completely true—but also that no undisclosed props or mock-ups or photographic techniques were used in photographing the presentation.

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fraud (R. 52-53). It never faced the basic question why, if the camera shows what the product in truth and in fact will do, there is any deception, or remotely any fraud or false factual representation about the product.

In its brief on the second appeal, the Commission, through different counsel, rested its theory on the proposition that in the circumstances sought to be reached by its order advertisers would have "falsely represented that their product claims have been verified by objective proof." (Comm. Br. 12). But if the experiment or test concerned had been and can be performed, the claimed verification of product claims by experimental proof is a true representation.

The cardinal difficulty with the Government's position is that it confuses the factual representation made by an advertisement, the promise it makes about what the product will do, with the method used to communicate that promise. The assumption, made wholly without any evidence of record, is that the viewer's determination to buy or not to buy the product might turn, not on whether the tests are valid and the claims are true, but on whether the faithfully portrayed experiment was photographed in a laboratory rather than in a studio.

If the Commission is right that there is conveyed to the viewer an implied representation that he is seeing an actual test before his very eyes in the laboratory, and that this is significant to him (Gov't Br. p. 21), then many normal practices in television such as prerecording commercials are suspect on the Commission theory. But the Commission has never suggested that this is so, perhaps because if it attempted to distinguish live from filmed or taped commercials, the pointlessness of its concern with the irrelevant question of photographic techniques would be glaringly apparent. There is no more logic in the Government's concern with means of communication than there would be in a suggestion that an overseas message accurately transmitted would have any different meaning depending on whether it came by transoceanic cable or by radio. The *method* used to convey the message does not qualify the faithful transmission.

It is no more a "factual misrepresentation" about a product to employ a photographic prop in photographing an accurate portrayal of a test than it is to use a painted backdrop in a studio, red colored water to simulate tea, an artificial head on a photographed glass of beer or mashed potatoes to portray ice cream—none of which props or mock-ups the Commission regards as "factual misrepresentations which are deceptive." Where these uses of photographic props or mock-ups convey to the consumer a truthful claim about the product, their use does not collaterally constitute an implied factual misrepresentation relating to the product. The consumer is interested in what the advertisement says to him, not in the photo-

graphic method used to convey the message. It is unwarranted to suggest that the use of a photographic prop or mock-up, in and of itself, makes any factual representation relating to the product or what it can do.

Of course it is reasonable to assume, as did the court below, that the viewer will infer that "no basic dishonesty has been introduced into the picture by the photographic process." (R. 138). Where there is any such dishonesty, the portrayal makes a false claim as to what the product can do. Yet the Commission's legal theory and its order on mock-ups and props do not deal with that point. Photographic dishonesty is not an element of what is forbidden by the order. It proscribes any undisclosed use of a prop or mock-up even where the photographic portrayal is faithful and accurate. But where the actual test performed is faithfully portrayed, any implied representation of no photographic dishonesty is honored, and there is no deception whatever.

2. ONLY MATERIAL MISREPRESENTATIONS ARE UNLAWFUL, AND ANY IMPLIED REPRESENTATION OF THE KIND INFERRED BY THE GOVERNMENT IN THE HYPOTHESIZED ADVERTISEMENT IS IMMATERIAL.

The Government recognizes throughout that if it is to be held unlawful any factual misrepresentation in a challenged advertisement must be material in that the purchaser's determination to buy will be affected by it. (*E. g.*, Gov't Br. pp. 9, 10). A television commercial portraying a woman being sawed in half would obviously be false, but no purchaser would be affected in his buying by that falsity.

Accordingly, even if credulity is stretched, and in the hypothetical situation the Commission erected as a basis for its order it is assumed that an advertisement portraying an accurate test through the use of a photographic mock-up nevertheless makes an implied "factual misrepresentation" directly relating to the advertised product, the challenged advertisement is unlawful only if it is misleading in a material respect. Only material misrepresentations are illegal under Section 5 of the Act.[11]

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[11] Sections 12 and 15 of the Federal Trade Commission Act, 15 U.S.C. §§ 52, 55, are instructive on this point. They were added

The implied representation that the Commission and the Government assume to see is that not only has the depicted test been made and it is accurately portrayed, but also that it was photographed *in situ* without the use of photographic props or mock-ups. If this is an implied factual representation relating to the product, it is plainly immaterial. The viewer will be induced to buy by the claim that the product will perform as represented in the portrayed test. He has no interest in and his purchase is not affected by whether the portrayed test was photographed in the laboratory or in the studio, in black and white or in color, or with or without the use of a photographic prop or mockup. As the court below observed, the viewer is not buying the photographic technique; "he is buying the product." (R. 42).

The legal rule here invented by the Commission—for the hypothetical situation to which its order is directed—is inconsistent with the legal yardstick it applies in determining the meaning of advertisements. In *Heinz W. Kirchner*, 3 CCH Trade Reg. Rep. ¶ 16,664 (Nov. 7, 1963), the advertiser claimed that a swimming aid to be worn underneath a bathing suit was "thin and invisible." This was a direct advertising claim and not merely an assumed implication. Commissioner Elman, the author of the two opinions in the present proceeding, held for the Commission that the advertisement in this aspect was not unlawfully deceptive. In so doing he observed:

> "An advertiser cannot be charged with liability in respect of every conceivable misconception, however outlandish, to which his representations might be sub-

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by the Wheeler-Lea Act of 1938, 52 Stat. 111, the same statute that amended § 5 to include the prohibition of "unfair or deceptive practices" as well as "unfair methods of competition." Section 12(a) makes it unlawful to disseminate "any false advertisement" concerning foods, drugs, devices, or cosmetics. Section 12(b) makes any such dissemination an "unfair or deceptive act or practice" within the meaning of § 5. Section 15 defines a "false advertisement" as one that is "misleading in a material respect."

> ject among the foolish or feeble-minded. Some people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim. Perhaps a few misguided souls believe, for example, that all 'Danish pastry' is made in Denmark. Is it, therefore, an actionable deception to advertise 'Danish pastry' when it is made in this country? Of course not." 3 CCH Trade Reg. Rep. at 21,539-40.

A fortiori, on the issue here presented, where everything the advertisement communicates relating to the product and what it can do is completely truthful; where any assumed inference on the part of the viewer that the accurate portrayal was photographed in the laboratory rather than faithfully portrayed by photography in a studio would be an inference of a wholly immaterial representation, unrelated to what the advertisement claims about the product to induce the viewer to purchase, the advertisement is neither false nor misleading nor deceptive within the meaning of the statute. It is not a representation in any way relating to the product or to its purchase, so that even if the strained suggestion that there is such an implied representation were realistic, the representation plainly would be immaterial.

B. THERE IS NO PRECEDENT FOR HOLDING THAT THE USE OF A PHOTOGRAPHIC PROP OR MOCK-UP IN PORTRAYING A TRUE EXPERIMENT IS PER SE A DECEPTIVE OR UNFAIR PRACTICE UNDER THE ACT.

To buttress its conclusion that the undisclosed use of a photographic prop in photographing a test or experiment, in an advertisement making completely true claims about a product, is *per se* illegal, the Government asserts that there are controlling judicial precedents for its position. In that assertion the Government is wrong.

The Government's attempted argument based on authority necessarily assumes its own conclusion. We agree that it is settled that Section 5 proscribes "the intentional misrepresentation of *any* fact which would constitute a mate-

rial factor in a purchaser's decision to buy a product." (Gov't Br. p. 13). But in every decision in which that general rule was evolved and has been applied the misrepresentation related to the product and in no instance did it concern the method by which any representation concerning the product was communicated. None of the cases confused, as the Commission and the Government arguing on its behalf have, *how* an advertised message is communicated with *what* it says.

This is true whether the advertisement made a direct or implied claim about the quality or merits of the product, *FTC* v. *Algoma Lumber Co.*, 291 U. S. 67 (1934), or the statement relating to the product had to do with what the Commission now terms "extrinsic factors." (Gov't Br. p. 14). The cases are discussed in the margin.[12]

Departing from the decided cases, the Government resorts to the analogue of an advertiser stating falsely that he is a minister or a judge or a relative of the buyer, thereby implying that he can be trusted "as to the truth of his claims." It is asserted that "regardless of the truth or falsity of the claims made for the product, such deception in the means of convincing buyers of the truth of the claims is unfair both to purchasers and to

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[12] In FTC *v.* Standard Educ. Soc'y, 86 F. 2d 692 (2d Cir. 1936), *modified*, 302 U.S. 112 (1937), the *fact* that the offer was restricted was an inducement to purchase that related to the product, and not to how that fact was communicated. This is true of every case cited by the Government. The failure to disclose the country of origin of a product is, under some circumstances, a false implied representation of domestic origin. But that falsity has to do with what is said about the product, not with how the message is conveyed. A false representation about actual origin goes to the quality of the product, *e.g.*, "Havana Cigar." El Moro Cigar Co. *v.* FTC, 107 F. 2d 429 (4th Cir. 1939); *cf.* Korber Hats, Inc. *v.* FTC, 311 F. 2d 358 (1st Cir. 1962). In FTC *v.* Royal Milling Co., 288 U.S. 212 (1933), the statement of the seller's trade status was false, and the representation that the seller was the original miller obviously concerned the quality of the product. The Commission's attempted citation to false testimonials was twice completely dissipated by the court below (R. 41 n.9, 137 n.14), which cogently pointed out that the correct analogy would be to a testimonial that had been received but that was merely recopied in the advertisement because, for example, the original would not reproduce.

honest competitors." (Gov't Br. p. 15). The analogue is wholly inapposite. An apter analogy would be a situation where the seller was in fact a judge or minister. Would the advertisement become materially false or misleading because he wore a red robe that would appear black when photographed for television, or a blue clerical collar that would appear white when photographed? If he were in fact a relative, would the application of make-up to accentuate the family resemblance, prior to his being photographed, in any way affect the truth of the claim? Would, as the Government here argues, any viewer be "significantly deceived in the exercise of his preferences," or in believing the statements advanced by the judge, minister, or relative, by these photographic techniques so long as the underlying representation, even though extrinsic to the product, was in fact true? (*Cf.* Gov't Br. p. 15).[13]

C. *THE LEGAL CONCLUSION ON WHICH THE ORDER RESTS CANNOT BE SUSTAINED AS AN EXERCISE OF THE COMMISSION'S DISCRETION.*

The Government contends that the Commission's legal conclusion and its order based on that rule of law must be

[13] The Government's further strained analogy to an advertisement falsely representing that a seller contributes one-half of his profits to charity or that he is impoverished (Gov't Br. p. 15 n. 4) does not advance its case. If the extrinsic fact represented were true, that the seller's profits went to charity or that he was impoverished, it would make no difference if he were portrayed against a painted background of a church, of a school, or even of the county poorhouse.

A truly relevant analogy is that offered by the court below. In discussing the Commission's then asserted contention that "in a 'genuine' test the viewer has more 'proof' than the advertiser's 'word,'" the court pointed out that prerecording of a television commercial has never been challenged by the Commission. (R. 137). Yet in prerecording a portrayed test, there is an equal possible inference by the viewer that the test not only was once carried out but can be reproduced. As to this, the viewer is equally dependent upon the advertiser's word. If the test is not a true test because it cannot be reproduced, the claim it advances about what the product can do is false and misleading. But the Commission has never suggested that prerecording of a commercial on television tape constitutes an unfair or deceptive practice under the Act.

sustained as a matter confided to agency discretion subject only to review for abuse of discretion. This argument must fail for at least four compelling reasons.

FIRST, while we do not contend that the content of the phrase "unfair or deceptive acts or practices" is static, the Commission is not left at large to rewrite the statute. It was not empowered to determine that an advertisement that makes completely truthful claims about the advertised product becomes false and misleading because of the method by which those claims are communicated. Inescapably, the entire argument about administrative discretion rests on the premised prior legal conclusion that material factual deception exists in an advertisement making a truthful claim by a faithful portrayal of a valid test or experiment solely because of the undisclosed use of a photographic prop or mock-up in the photography.

The argument is thus completely circular. The Commission does not independently sustain its order as being a matter of exclusive agency competence by an argument that necessarily assumes that it is right in the admittedly nondiscretionary conclusion of law on which the order is based—that the undisclosed use of a photographic prop or mock-up in an advertisement is deceptive *per se*.[14]

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[14] Even a casual reading of the relevant part of the Government's brief (pp. 16-21) discloses the circular fallacy. It first assumes that the use of a photographic prop in portraying a valid experiment is *per se* a "misrepresentation" and a "material" misrepresentation. (P. 16). From this it proceeds to the argument that the Commission, and not the court, is entitled to weigh the harms and needs of what it erroneously calls a "rigged experiment" to determine whether the assumed "material misrepresentation" is ever to be tolerated. Of course, the court below did not purport to weigh the harms and needs of "a rigged experiment" but discussed a portrayal "illustrating faithfully a test which has been actually performed" (R. 136), and it held not that "material misrepresentations" were to be tolerated but that there was no material misrepresentation in such a portrayal.

By the same token the argument that the use of a photographic prop or mock-up in making completely truthful claims is unfair to honest competitors (Gov't Br. p. 20) is patently circular. Where no deception exists, no competitor is unfairly injured. Nor is any advertiser given an unfair competitive advantage.

SECOND, whatever may be the ambit of agency discretion, it must be exercised on some facts of record. There were none at all in this proceeding as to any of the assumptions with respect to the use of props or mock-up to make *truthful* product claims, which the Commission now advances to support its legal position. As noted, *supra* pp. 6-7, the novel legal theory on which this order rests was imported into the proceeding by a hypothetical "even if" assumption on the part of the Commission when it reversed the hearing examiner's dismissal of the complaint. (R. 14).[15] Administrative action cannot be taken *in vacuo*, and agency interpretations of law cannot rest on adjectival characterization of a method of presentation without regard to the truth of the advertisement.

THIRD, the arguments advanced are unfounded. The claim for recognition of the Commission's discretion is predicated on the assertion that the Commission can weigh "the harms of rigged experimental proofs" against the need for them. (Gov't Br. p. 17). Obviously, the premise is fallacious if not nonsensical.[16] The experiment or test, faithfully portrayed by a studio photograph in which props or mock-ups were used, is not rigged.[17]

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[15] Parts II and IV of the order (R. 94, 95) prohibit the making of any false claim as to the qualities or merits of any shaving cream, and would ban the challenged advertisements that were actually involved. Parts I and III, which cover *all* products and proscribe the use of props or mock-ups even where the claims are completely true, rest entirely on the hypothetical situation posited after the record was closed and the Commission was reviewing the hearing examiner's decision.

[16] If the test or experiment were rigged, the claim made by showing it would not be supported, and the advertisement would be false and misleading under the Act.

[17] On the Commission's assumptions that in an advertisement making completely truthful claims the use of a photographic prop or mock-up would be material to the viewer, the observations of Mr. Justice Frankfurter during the course of oral argument in NLRB *v.* Pittsburgh Steamship Co., 340 U. S. 498 (1951), are relevant. There this Court sustained a judicial reversal of an order of the Board for lack of substantial evidence of record. Mr. Justice Frankfurter observed: "[W]ith all due regard to

Another exposure of the same fallacy in the Commission's approach is seen in the suggestion (Gov't Br. p. 18) that the order is carefully drawn "so as to apply only to *deception* in the presentation of a 'test, experiment or demonstration that * * * is represented to the public as *actual* proof of a *claim* made for the product'." (Emphasis added). Once again, this assumes the conclusion: The Commission holds that the hypothetical situation of a valid test making a true product claim, faithfully photographed with the use of a prop or mock-up, is as a matter of law a material deception. Moreover, the fact is that what is represented (what the viewer is given to understand by the picture of the test or experiment portrayed) is actual proof of the "claim made for the product."

On the other side of the coin the Government concedes that

> "the technical limitations of television may prevent a sponsor from showing on television an experiment which it can perform and has performed elsewhere." (Gov't Br. p. 18).

It insists, however, that where this is true—as, for example, where the camera cannot faithfully reproduce what was done without the employment of a photographic prop, or there are physical difficulties, as in the nylon rope example, in photographing the actual test in a studio—the undisclosed use of the photographic prop or mock-up can be proscribed in order to require that the advertiser let "the viewer know the truth." (Gov't Br. p. 19). What truth? The product claim made is true. The test is valid and it can be performed and has been performed elsewhere. The

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the expertise and expertness of the National Labor Relations Board, judges also have a good deal of experience in the world with these matters. If I were a circuit judge and if I were told to base my judgment on substantial evidence on the record considered as a whole, I do not think I would be free to say this looks to me like an utter cock-and-bull story but those fellows, Paul Herzog and the others, know human nature and I do not." Jaffe, Judicial Review: Question of Fact, 69 Harv. L. Rev. 1020, 1039 (1956).

visual representation of the test is a faithful portrayal of what was performed.

FOURTH, the Government in its brief before this Court dilates on behalf of the Commission on what it terms "the harms of sham 'proofs.'" (Gov't Br. p. 19). Once again, this Court will appreciate that there is nothing in the record to support any of the suggestions advanced.[18] The arguments are contrived, and they have validity only if, again, the initial legal premise of a material misrepresentation is conceded. That premise is not established by characterizing a valid test actually performed and faithfully portrayed as a "rigged test," or "rigged experiments and tests" or as "a fake experiment." (Gov't Br. pp. 20-21). The cardinal point is that the test or experiment portrayed is *not* a rigged or a faked experiment.

The Government goes so far in this part of its brief as to say that unless its order stands the full potentiality of television will not be realized. It says "the revolutionary capability of television—the capacity to demonstrate the truth of a claim to prospective buyers—is nullified by the decision below." (Gov't Br. p. 20). This extraordinary result of permitting photographic props or mock-ups to be used to compensate for vagaries of the camera or for the sake of convenience apparently is thought to follow from the fact that viewers will not know whom to trust and will therefore trust no television advertiser unless they can be sure that every television depiction of a test or experiment was actually photographed in the laboratory. The fact is, of course, that viewers will have no reason to be and will not be disillusioned by television depictions if they know that every portrayal they see of a test or experiment

[18] The Government's words on this score (Gov't Br. pp. 19-21), which in their portentous gravity seem altogether out of proportion to what is actually in issue, all deal with television and the supposed need to protect television viewers and the integrity of television as an advertising medium. The Commission's order is not so limited. The order proscribes the undisclosed use of photographic props or mock-ups in portrayals presented in printed advertisments in newspapers, magazines and all other printed media, as well as in photographs offered in catalogues, advertising displays shipped in commerce and all similar advertising materials.

making a claim for a product is of a test that has been and can be performed and the product they buy has exactly the qualities claimed for it, as proved by the test or experiment they have seen faithfully depicted.[19]

The Commission's administrative discretion does not extend to taking a hypothetical situation, as to which there is no evidence in the record before it, and using it to evolve a *per se* rule of law proscribing the undisclosed use of mock-ups or props in faithfully portraying a valid experiment that makes a completely truthful claim about a product.

II. The ambiguities in the Commission's order are an inevitable product of the irrationality of the legal proposition on which the order is based and thus disclose the Commission's basic error, and they are in themselves a ground for setting the order aside.

In this Court the Government endeavors in the final part of its brief to draw a red herring across the entire legal issue as to whether an advertisement in which a valid test or experiment is faithfully portrayed with the undisclosed use of a mock-up or prop and which makes completely truthful product claims can be held deceptive under Section 5 of the Federal Trade Commission Act. (Gov't Br. pp. 21-25). The Government states erroneously that the court below rested its decision "in large part upon the problems of compliance, administration and enforcement" to which that part of the Commission's order relating to photographic props and mock-ups gives rise. (*Id.* p. 21). That statement as to the basis for the lower court's decision is unfounded.

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[19] Once again it must be noted that the continued insistence that the Court is here concerned with "factual representations" that are "false" (Gov't Br. pp. 9, 10) is a misstatement because every factual representation made by an advertisement faithfully depicting what the product can do is completely true.

This is not to say, however, that if the court below had reached the question of the many ambiguities in Parts I and III of the order (R. 93-94), it would not have held that the order must be set aside because of those ambiguities.

In *FTC* v. *Henry Broch & Co.*, 368 U. S. 360, 367-68 (1962), this Court observed that:

> "The severity of possible penalties prescribed by the amendments for violation of orders which have become final underlines the necessity for fashioning *orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application.*" (Emphasis added).

For an advertising agency such as this respondent the coverage of the mock-up parts of the Commission's order, reaching the advertisement (by any pictorial means, not just by television) of "any product in commerce," emphasizes further the necessity for clarity. In its impact on an advertising agency the order would reach *every product* concerning which the agency prepared advertisements for any of its clients. Under Section 5(l) of the Act, 15 U. S. C. § 45(l), violation of the order can result in a civil penalty action in which the advertising agency

> "... shall forfeit and pay to the United States a civil penalty of not more than $5,000 for *each violation*. ... Each separate violation ... shall be a separate offense, except that in the case of a violation through *continuing failure or neglect* to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a *separate* offense."[20] (Emphasis added).

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[20] A single television commercial that falls short of compliance, broadcast 85 nights on a national network of 50 cities, might conceivably, if the penalty action could be based on the second sentence of § 5(l), yield a daily penalty of $425,000 and accumulate an annual penalty of $21,125,000. How long the Commission might

In its brief the Government concedes the ambiguity of the order when it says that "admittedly, there will be a number of cases in which the line is narrow between a representation that experimental proof is being furnished and a mere portrayal of a product's characteristics." (Gov't Br. p. 22). It seeks nevertheless to sustain the order despite its patent ambiguity on grounds that we shall discuss in a moment. The critical point, however, is that, having acknowledged that there is a "narrow line" between what the order proscribes and what it permits, the Government does not address itself to the fatal defect in the order exposed by the inability of the Court of Appeals to see any line at all, except one drawn arbitrarily by fiat.

In its opinion the court below pointed to the obvious ambiguities in the sections of the Commission order dealing with the use of props and mock-ups. (R. 134-36). But it was not because of those ambiguities themselves that it set the Commission's order aside. It set the order aside because it could not accept, as it had not been able to accept on the first appeal, the Commission's conclusion that as a matter of law the undisclosed use of props or mock-ups in an advertisement making completely truthful claims was a deceptive practice under the statute.

The ambiguities were recited by the court by way of demonstrating that there was no logic or sense in the assumptions and distinctions the Commission advanced in attempting to draw a line between the permitted "casual or incidental" use of mock-ups to "state and portray a product claim" (Gov't Br. p. 18) and the prohibited use of props or mock-ups in portraying a valid test, experiment or demonstration. The court tested the various attempted formulations of the Commission against the order and

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wait before asking that suit be instituted is not controlled by the statute. There is the further possibility that if, as the Government here suggests, there were some type of consultation with the Commission staff, and failure to follow the informal opinions given, use of the penalty concept of "continuing failure or neglect to obey" would be sought.

found that the ambiguities in the order laid bare the defects of the Commission's legal position.

As one example, the court below pointed to the illogic of the Commission in attempting to distinguish the case of a mock-up of advertised ice cream that is merely pictured on the television screen. This would not, the Commission has said authoritatively, be within the legal rule it advanced. (R. 134). The court concluded by saying that the nub of the case

> "is either that Colgate [in the portrayal of the sandpaper test] impliedly says its depiction is real and the ice cream manufacturer does not, or that the misrepresentation is material in the case of the sandpaper, and harmless in the case of the ice cream. The Commission says the ice cream case is different, but, with all deference, we find its opinion, while long on generalities, short on analysis." (R. 137-38).

The Government, as we have said, makes no attempt to meet this part of the opinion of the court below.

A supposed legal principle is not a valid principle if it includes some situations and excludes others on some concept of inclusion or exclusion that cannot be articulated in terms of reason or logic. A theory by which the use of a photographic prop or mock-up in an advertisement showing a faithful portrayal of a valid test or experiment impliedly makes a false representation of fact that is material and deceptive to the viewer—but that stops short of including all other uses of photographic props or mock-ups from which the identical representation could equally be inferred—is neither logical nor a proper interpretation of Section 5. This was a basis for the Court of Appeals' reversal of the Commission on its legal theory, and its reasoning in this respect is untouched by anything the Government has said in this Court.

Even so, the Government's attempts to defend the ambiguities in the order that it concedes to exist are unsuc-

cessful. One such attempt is its statement that the respondents can be certain of compliance "simply by avoiding any suggestion that they are furnishing experimental proof of their claims when they are not." (Gov't Br. p. 24). This is no answer at all. It means that to avoid the possibility of violating the order respondents hereafter must forgo—in television advertising, in printed advertisements and in catalogues—all photographic portrayals with undisclosed mock-ups or props of anything that someone might think was properly to be considered a test, experiment or demonstration even though it made a completely truthful claim for a product.

Further, the Government suggests that the respondents can come to the Commission and get definite advice from it as to whether their future advertisements will or will not conform to this ambiguous order.[21] This attempted answer to the patent ambiguity of the order cannot be accepted. Advertising is both dynamic and complicated. To suggest that timely consideration of all television commercials and all printed advertising materials could be obtained from the Commission is far-fetched indeed. Months could pass before a Commission decision was reached. Moreover, the suggestion that the agency could effectively undertake this burden is wholly unrealistic

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[21] In support the Government cites Vanity Fair Paper Mills, Inc. *v.* FTC, 311 F.2d 480, 488 (2d Cir. 1962). (Gov't Br. p. 24). That case involved advertising allowances that violated the Robinson-Patman Act. Commissioner Elman dissented on the ground that an order should not be "in broad, indefinite, and ambiguous terms." 311 F.2d at 487. The Court of Appeals in fact modified the Commission order. The court did advert in the passage quoted by the Government to the filing of a compliance report to indicate the changes the respondent was making in its practices to make them comply. In the circumstances this need have been only a single, simple statement. It is absurd to suggest that a compliance report under the present order could conceivably embrace all proposed future advertising lay-outs and television tapes that include portrayals of experiments or tests for every product dealt with by an advertising agency for each of its clients.

in the light of the commonly recognized delays incurred in its normal enforcement activities.[22]

But the vice of the suggestion bites more deeply. The Act provides that orders are to be enforced either by a contempt proceeding or by a civil penalty suit. That is the predicate of the *Broch* decision. The statute nowhere contemplates a virtual licensing system whereby through the entry of sweeping orders of manifest ambiguity the Commission is authorized to act as a clearing house for advertising copy and television commercials.

The conceded ambiguities in the Commission's order are not cured by either of the Government's suggestions. Nor could they be cured by a direction to rewrite the order to clarify it but with the legal theory on which it rests retained. The ambiguities derive from the theory and are inescapable in any order premised upon it.

III. The judgment of the Court of Appeals should be affirmed or the writ dismissed as improvidently granted for the independent reason that the Commission's order on remand flouted the original mandate of the Court of Appeals.

In our brief in opposition we said that, if the petition for certiorari were granted, we would assert as an independent ground for sustaining the decision of the Court of Appeals the controlling point that the Commission on remand from the Court of Appeals' first decision did not conform its order to the mandate of the court but instead

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[22] The rule referred to by the Government plainly requires Commission action rather than mere staff comment. Parts I and III of the order, the portions here under consideration, apply to advertisements for "all products" sold by the advertiser and "all products" dealt with by the advertising agency. Any application to resolve the admitted ambiguities in the order must "include full and complete information." In the light of the confusion running throughout the Commission's three opinions as to what it would consider a "genuine test, experiment or demonstration," as distinguished from a "casual or incidental" display of the product, the impracticability of the Government's ultimate defense of the Commission legal theory and ambiguous order needs little elaboration.

plainly flouted the mandate. For this reason the judgment should be affirmed or the writ dismissed as improvidently granted because, upon analysis, the issue is compliance with the mandate, an issue not worth this Court's attention. The Government has not adverted to the point in its brief.

That the Court of Appeals' mandate was flouted is clear to anyone who reads the original order of the Commission, the opinion and judgment of the Court of Appeals setting that order aside and the subsequent opinions and final order of the Commission. (*Cf.* R. 90). In brief, although directed to proceed "in accordance with" an opinion that flatly rejected the legal proposition that the undisclosed use of a mock-up or prop made unlawful an advertisement making a truthful claim for a product and that called for the preparation of "an entirely new" order, the Commission adhered to the proposition of law and merely revised its order to cure what it then professed to see as some original lack of clarity in it.

The Court of Appeals knew that its mandate had been flouted. It noted that the Commission had said on remand that "various suggestions" of the court had been accepted in substantial part. The court then stated that in its original opinion it had "reached a number of conclusions not labeled suggestions which the Commission was not free to disregard under the mandate." To this sentence there was cited Section 5(i) of the Federal Trade Commission Act, the terms of which we shall discuss below. (R. 132).

Although the court indulgently undertook to discuss the merits of the Commission's position as restated, it made clear in disposing of the case that it regarded the restated position as contrary to its original mandate. In disposing of the case, the court said that

> "we instruct the Commission as we thought we had directed it before, to enter an order confined to the facts of this case, where respondents used a mock-up to demonstrate something which in fact could not be accomplished." (R. 139).

In any event, this Court, which has ultimate responsibility for the effective administration of justice in the federal courts, is not bound by the Court of Appeals' act of grace in indulging, in its discussion, the obduracy of the

Commission. It is vital to the administration of justice that inferior tribunals obey the decisions of the courts empowered to review their judgments. The rule is clear as to inferior courts. *E. g., United States* v. *Haley*, 371 U. S. 18 (1962); *Sibbald* v. *United States*, 12 Pet. 488, 492 (1838). It holds for administrative agencies as well.[23] *Morand Bros. Beverage Co.* v. *NLRB*, 204 F. 2d 529 (7th Cir. 1953), *cert. denied*, 346 U. S. 909 (1953); *cf. The Stacey Mfg. Co.* v. *Commissioner*, 237 F. 2d 605 (6th Cir. 1956). The principle should be enforced here.

If the Federal Trade Commission wished to press for its interpretation of Section 5 of the Federal Trade Commission Act after the adverse decision of the Court of Appeals, its proper course was to ask this Court for a writ of certiorari to review that decision.[24] The Commission did not do this. Instead, it purported to accept the remand of the case to it by the Court of Appeals and embellished its legal

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[23] FCC *v.* Pottsville Broadcasting Co., 309 U. S. 134 (1940), is by no means to the contrary. The Court there spelled out the difference, in cases involving the administrative grant of a franchise, between the relationship of court to court and court to agency, *id.* at 141-45, principally that a reviewing court may not grant a franchise and is not always privileged to dictate the proceedings to be followed by an agency on remand in the same way and in the same detail as an appellate court may specify the judgment to be entered or the proceedings to be followed by a trial court on remand. But the Court also declared that "on review the court may . . . correct errors of law and on remand the [agency] is bound to act upon the correction." *Id.* at 145. That is what the reviewing court did in its first opinion and judgment here, and the agency did not act upon the correction but perpetuated its legal error. Moreover, the present proceeding does not concern the grant of a franchise, and the Federal Trade Commission Act affords the reviewing court the power directly to modify a Commission order. Vanity Fair Paper Mills, Inc. *v.* FTC, 311 F.2d 480 (2d Cir. 1962); Bankers Security Corp. *v.* FTC, 297 F.2d 403 (3d Cir. 1961).

[24] It could also have applied for a rehearing. If it had, every restatement in its second opinion could have appeared in its brief.

Following the decision in Sunshine Biscuits, Inc. *v.* FTC, 306 F.2d 48 (7th Cir. 1962), setting aside a Commission cease and desist order because of a disagreement with it concerning the scope of the meeting competition defense under the Robinson-Patman Act, the Commission issued a public announcement that it would not file a petition for certiorari even though it pointed to a conflict in the circuits on the question and said its own view of the law—opposed to that of the court of appeals—had not changed: Commissioner Elman issued a dissenting statement. 5 CCH Trade Reg. Rep. ¶ 50,166.

position without altering it and revised its order without basically altering it in the almost certain knowledge that its disposition would not be accepted as substantial compliance with the mandate, but that the matter would be presented again to the Court of Appeals. (*Cf.* R. 48-49).

This extraordinary procedure is of a piece with the Commission's manifested determination to make of this "trivial" case a vehicle for extending its control over advertising by reaching out to decide a question not posed on the record before it and entering, on unsupported assumptions that are applicable, if to anything at all, only to television, an order governing all pictorial advertisements. This Court should not countenance the procedure the Commission has followed in attempting to create the legal rule on which its order is based.

Indeed, Congress has specifically prescribed that such a procedure not be followed. Section 5(i) of the Federal Trade Commission Act provides that, after a court of appeals has set aside an order of the Commission and the time for filing a petition for certiorari has passed without a petition being filed,

> "then the order of the Commission *rendered in accordance with the mandate* of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that *it will accord with the mandate,* in which event the order of the Commission shall become final when so corrected." Federal Trade Commission Act § 5(i), 52 Stat. 114, as amended, 15 U. S. C. § 45(i). (Emphasis added).

Thus the statute, embodying the principle of sound judicial administration that we have mentioned, contemplates only an order on remand that complies with a court of appeals' mandate, not an order such as was entered by the Commission in this case, designed to raise again, with what the agency may hope is a somewhat more favorable focus, the legal question disposed of by the court of appeals.

CONCLUSION

The judgment of the Court of Appeals should be affirmed or the writ of certiorari dismissed as improvidently granted.

Respectfully submitted,

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